

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

AMERICONNECT, INC.

INVESTIGATION INTO THE ALLEGED
VIOLATIONS OF KRS 278.020 AND KRS
278.160

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) CASE NO. 95-220
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O R D E R

This proceeding concerns alleged violations of KRS 278.020 and 278.160. AmeriConnect, Inc. ("AmeriConnect") admits violating these statutes but opposes refunding any amounts collected unlawfully. At issue is whether AmeriConnect must refund unlawfully collected revenues which were not set forth in any filed tariff. Finding in the affirmative, the Commission orders AmeriConnect to refund all amounts illegally collected and assesses a penalty of \$25 against it.

PROCEDURAL BACKGROUND

On June 9, 1995, the Commission initiated this proceeding and ordered AmeriConnect to show cause why it should not be penalized for alleged violations of KRS 278.020 and KRS 278.160. AmeriConnect and Commission Staff have stipulated the facts of this case. AmeriConnect has briefed the issues arising out of this case. Upon the submission of AmeriConnect's supplemental brief, this case was submitted for decision.¹

¹ Order of January 31, 1996.

FACTS

AmeriConnect is a publicly held Delaware corporation which is headquartered in Overland Park, Kansas. It is a switchless, non-facilities-based, interexchange resale carrier providing 1+, 800, and travel card interexchange telecommunications services primarily to medium and small businesses. It does not hold a Certificate of Public Convenience and Necessity to provide telecommunications services within Kentucky nor does it have an approved schedule of rates on file with the Commission.

On February 15, 1995, AmeriConnect applied for a Certificate of Public Convenience and Necessity to operate as a resale common carrier of telecommunications services within Kentucky.² While reviewing the utility's application, the Commission discovered that AmeriConnect had previously operated in Kentucky without a Certificate and without filing with the Commission a schedule of rates for these services. AmeriConnect admits billing and collecting \$76,197 for telecommunication services provided within Kentucky prior to December 31, 1994.³ AmeriConnect has ceased providing intrastate telecommunications services in Kentucky pending the outcome of its application for a Certificate.

² Case No. 95-058, Application of AmeriConnect, Inc., for a Certificate of Public Convenience and Necessity to Operate as a Resale Common Carrier of Telecommunications Services Within the State of Kentucky.

³ See Case No. 95-058, AmeriConnect's Response to the Order of March 31, 1995, Item 1.

DISCUSSION

KRS 278.160 codifies the "filed rate doctrine." It requires a utility to file with the Commission "schedules showing all rates and conditions for service established by it and collected or enforced." KRS 278.160(1). It further states:

No utility shall charge, demand, collect or receive from any person a greater or less compensation for any service rendered or to be rendered than that prescribed in its filed schedules, and no person shall receive any service from any utility for a compensation greater or less than that prescribed in such schedules.

KRS 278.160(2).

Interpreting similarly worded statutes from other jurisdictions, courts have held that utilities must strictly adhere to their published rate schedules and may not, either by agreement or conduct, depart from them. Corporation De Gestion Ste-Foy v. Florida Power and Light Co., 385 So.2d 124 (Fla. Dist. Ct. App. 1980).⁴ A similar rule applies to the published rate schedules of common carriers. See, e.g., Sallee Horse Vans, Inc. v. Pessin, Ky.App., 763 S.W.2d 149 (1988).

Failure to file with the Commission a rate schedule for its regulated services deprives a utility of the right to charge or collect those rates. A utility "can claim no rate as a legal right that is other than the filed rate." Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246, 251 (1951). See also GTE North Inc. v. Pub. Serv. Comm'n, 500

⁴ See also, Haverhill Gas Co. v. Findlen, 258 N.E.2d 294 (Mass. 1970); Laclede Gas Co. v. Solon Gershman, Inc., 539 S.W.2d 574 (Mo. App. 1976); Capital Properties Co. v. Pub. Serv. Comm'n, 457 N.Y.S.2d 635 (N.Y. App. Div. 1982); West Penn Power Co. v. Nationwide Mut. Ins. Co., 228 A.2d 218 (Pa. Super. Ct. 1967); Wisconsin Power & Light Co. v. Berlin Tanning & Mfg. Co., 83 N.W.2d 147 (Wis. 1957).

N.W.2d 284, 289 (Wis. 1993) ("[I]f the service provided for in this case was not tarified, GTE had no authority to charge any money, and violated the filed rate doctrine by receiving monies for services other than those properly filed with the appropriate regulatory authority."); Popowsky v. Pennsylvania Public Utility Comm'n, 647 A.2d 302 (Pa. Comwlth. 1994).

This inflexibility is, in part, the result of a strong public policy to ensure rate uniformity, to "have but one rate, open to all alike, and from which there could be no departure." Boston & M.R.R. v. Hooker, 233 U.S. 97, 112 (1914). Equality among customers cannot be maintained if enforcement of filed rate schedules is relaxed. For this reason, neither equitable considerations nor a utility's negligence may serve as a basis for departing from filed rate schedules. Boone County Sand & Gravel Co. v. Owen County Rural Elec. Co-op. Corp., Ky.App., 779 S.W.2d 224 (1989).

The doctrine is also intended to preserve the Commission's "primary jurisdiction over reasonableness of rates and . . . ensure that regulated companies charge only those rates of which the agency has been made cognizant." City of Cleveland, Ohio v. Fed. Power Comm'n, 525 F.2d 845, 854 (D.C. Cir. 1976). Filed rates have been reviewed and found reasonable by the Commission. Prior to becoming effective, they are examined and questioned. This scrutiny is one of the reasons for the Commission's existence.

While admitting it violated KRS 278.160, AmeriConnect argues that it should be permitted to retain the unlawfully collected revenues. In support of its position, AmeriConnect advances three arguments: First, refunding is inappropriate since the revenues were collected as part of a consensual agreement in which no party exercised monopoly power. Second, refunding is inconsistent with the Commission's efforts to promote competition within the telecommunications industry. Third, the absence of a willful violation of KRS 278.160 negates the need for refunds.

As to the first argument, neither the voluntary nature of the relationship between AmeriConnect and its customers nor the absence of any monopoly power is relevant to the issue of refunds. KRS 278.160 expressly limits a utility's right to collect compensation for utility services to that prescribed in its filed rates. Courts interpreting the filed rate doctrine have consistently held that a voluntary agreement to deviate from filed rates was unlawful and that the utility or common carrier was entitled to collect only the filed rate. See, e.g., Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246 (1951), Louisville & Nashville R. Co. v. Central Iron & Coal Co., 265 U.S. 59 (1924). These holdings have involved transactions where the exercise of monopolistic power was absent.⁵ See, e.g., Louisville & Nashville R. Co. v. Mead Johnson & Co., 737 F.2d 683, 690 n.5 (7th Cir. 1984).

As to AmeriConnect's second argument, the Commission finds no evidence that strict enforcement of KRS 278.160 will impede competition within the telecommunications industry. All telecommunications utilities are currently required to file their rates with the Commission. Several have been required to refund unlawfully collected revenues.⁶ The only means of ensuring a level playing field for all and thus promoting competition is the uniform enforcement of existing statutes. The strict enforcement of the filed rate doctrine

⁵ AmeriConnect relies upon the Commission's holding in Harold Telephone Co., Case No. 10170 (Ky. P.S.C. July 29, 1988). To the extent that Harold Telephone Co. holds that the assessment and collection of non-tariffed fees are permissible because the affected customers, of their own volition, requested and received the service in exchange for payments, it is contrary to KRS 278.160 and is overruled.

⁶ See, e.g., Affinity Network Inc., Case No. 92-025 (Ky. P.S.C. Mar. 24, 1992); Business Choice Network, Inc., Case No. 92-026 (Ky. P.S.C. Mar. 24, 1992); CTG Telecommunications, Inc., Case No. 92-042 (Ky. P.S.C. Apr. 3, 1992); Affinity Fund, Inc., Case No. 92-069 (Ky. P.S.C. Aug. 27, 1992); Phoenix Network Inc., Case No. 92-172 (Ky. P.S.C. July 22, 1992); Telenational Communications Limited Partnership, Case No. 92-173 (Ky. P.S.C. May 27, 1992); Working Assets Long Distance, Case No. 93-172 (Ky. P.S.C. June 10, 1993); U.S. Digital Network Limited Partnership, Case No. 93-479 (Ky. P.S.C. Apr. 22, 1994); Executone Information Systems, Case No. 94-057 (Ky. P.S.C. Mar. 29, 1994); Westinghouse Electric Corp., Case No. 94-312 (Jan. 30, 1995).

and competition, moreover, are not mutually exclusive. In other industries which were once heavily regulated and which are now being deregulated, the filed rate doctrine continues to be strictly enforced. See Rene Sacasas, The Filed Rate Doctrine: Casualty or Survivor of Deregulation?, 29 Duquesne Law Rev. 1 (1990).

Assuming arguendo that the filed rate doctrine impedes competition, a telecommunications utility may either petition the Legislature to amend KRS 278.160 or petition the Commission, pursuant to KRS 278.512, for prospective exemption from the filed rate doctrine. The Commission, however, cannot unilaterally and retroactively dispense with the doctrine merely because of AmeriConnect's failure to properly monitor its sales agents.

Finally, the Commission finds no merit in the contention that the lack of a conscious violation of KRS 278.160 precludes the refunding of unlawfully collected revenues. Assuming arguendo that AmeriConnect did not willfully violate KRS 278.160, the lack of any willful intent does not create a legal right to assess the unfiled rates. AmeriConnect may only assess and collect its filed rates. As the rates in question were not on file, AmeriConnect may not assess or collect them.

The Commission, moreover, finds that a willful violation of KRS 278.160 occurred in this case. AmeriConnect's sales agents knew or should have known that the contracts which they executed would lead to the provision of unauthorized and non-tariffed services in Kentucky. AmeriConnect should have applied for the appropriate regulatory approval or taken steps to prevent the provision of unauthorized services. Its failure to take such action constitutes a willful violation of KRS 278.020 and KRS 278.160.

In addition to the filed rate doctrine, other policy considerations mandate the refund of the unlawfully collected revenues. As KRS 278.160(2) prohibits the collection of the fees in question, permitting their retention is contrary to the literal language of that statute and

would represent a dereliction of the Commission's statutory duty to enforce KRS Chapter 278. See KRS 278.040(1). Failure to order a refund would permit AmeriConnect to profit from its violation of the law and encourage other utilities to imitate its conduct. Acquiescence by the Commission would undermine the long-held and widely-accepted public policy supporting the filed rate doctrine.

Permitting AmeriConnect's retention of the unlawfully collected fees would also violate the judicial prohibition against retroactive rate-making. It is a fundamental rule of utility rate-making that rates are exclusively prospective in application because rate-making is a legislative act. As such it is subject to the rules of statutory construction. See Public Service Comm'n v. Diamond State Tele. Co., 468 A.2d 1285 (Del. 1983). As the Commission had not approved AmeriConnect's rates when assessed, permitting AmeriConnect to retain them now would amount to retroactive Commission approval. See Sunflower Pipeline Co. v. State Corp. Comm'n, 624 P.2d 466 (Kan. App. 1981).

The Commission recognizes that its decision today may be viewed as inflexible and dogmatic. That, however, is the very nature of the filed rate doctrine. When enacting the filed rate doctrine, the Legislature "did not create a flexible standard for the courts [or this Commission] to apply in accordance with the facts, equities, and economic realities of the particular case." Western Transportation Co. v. Wilson and Co., Inc., 682 F.2d 1227, 1231 (7th Cir. 1982). It instead fashioned a hard and fast rule which must be applied in all cases.

SUMMARY

Having considered the evidence of record and being otherwise sufficiently advised, the Commission finds that:

1. As of December 31, 1994, AmeriConnect had collected fees in the amount of \$76,197 for intrastate telecommunications services within Kentucky.

2. AmeriConnect does not currently and has never held a Certificate of Public Convenience and Necessity to provide telecommunications services in Kentucky.

3. AmeriConnect does not currently nor at any time prior to this Order have a published tariff on file with the Commission.

4. By providing telecommunications services without a Certificate of Public Convenience and Necessity, AmeriConnect willfully violated KRS 278.020.

5. AmeriConnect's assessment and collection of fees for telecommunications service willfully violated KRS 278.160.

6. For its willful violation of KRS 278.020 and KRS 278.160, AmeriConnect should be assessed a penalty of \$25.

7. All fees collected by AmeriConnect for intrastate telecommunications services provided in Kentucky on or before the date of this Order were unlawfully collected and should be refunded.

IT IS THEREFORE ORDERED that:

1. AmeriConnect is assessed a penalty of Twenty-Five Dollars (\$25) for its willful violation of KRS 278.020 and 278.160.

2. Within 30 days of the date of this Order, AmeriConnect shall pay the assessed penalty. This payment shall be in the form of a cashier's or certified check made payable to "Treasurer, Commonwealth of Kentucky" and shall be mailed or delivered to: Office of General Counsel, Public Service Commission of Kentucky, 730 Schenkel Lane, Post Office Box 615, Frankfort, Kentucky 40602.

3. Within 60 days of the date of this Order, AmeriConnect shall refund all fees for intrastate telecommunications services which it has collected in Kentucky.

4. Within 120 days of the date of this Order, AmeriConnect shall file with the Commission a list of all persons receiving refunds and the amount of each refund.

Done at Frankfort, Kentucky, this 26th day of June, 1996.

PUBLIC SERVICE COMMISSION

Linda K. Breathitt
Chairman

[Signature]
Vice Chairman

Robert M. Davis
Commissioner

ATTEST:

Don Mills
Executive Director